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75-334

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September 17, 1975

R 75-527

Mr. Hadley A. Thomas
Associate Superintendent
Arizona Department of Education
1535 West Jefferson
Phoenix, Arizona 85007

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Dear Mr. Thomas:

This letter is in response to your memorandum to this office of August 28, 1975, in which you asked for this office's opinion whether the State Board of Education could allocate for the benefit of kindergarten pupils a part of the funds appropriated by House Bill 2423 (Ch. 152, Laws of 1975) for special English training and bilingual instruction. If the answer to that question is affirmative, you also requested this office's opinion whether there were any restrictions on the dollar amount that could be so allocated.

House Bill 2423, in subdivision 68 of section 1, appropriated a lump sum of \$850,000.00 to the State Board of Education and the Superintendent of Public Instruction for "the education of students enrolled in special English training as provided by section 15-1099, subsection D, Arizona Revised Statutes." Subsection D of A.R.S. § 15-1099 provides as follows:

Funds provided under the terms of this section shall be allocated for all eligible students in grades one through four prior to the allocation of remaining funds to the eligible students in grades five through eight.

That subsection obviously sets forth the legislative determination concerning the priorities in this area, and specifies that the funds shall be allocated first to the lower common grades, with any remainder then going to the upper common grades. As more fully explained hereafter, when the other related statutory provisions are analyzed, it seems clear that kindergarten should be included with the lower common grades when the allocation is made, though no specific direction in this regard is included in the above subsection.



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Article 10 of Chapter 10 of Title 15, of which the above-quoted provision is but a part, is composed of A.R.S. §§ 15-1097 through 15-1099. A.R.S. § 15-1097 generally provides for the establishment of bilingual and special English programs certified by the State Superintendent of Public Instruction pursuant to rules established by the State Board of Education. A.R.S. § 15-1098 generally empowers school district boards to establish and operate special courses of bilingual and English instruction for common school pupils. A.R.S. § 15-1099 then sets forth the method by which the state support for programs of bilingual instruction and special English training is to be apportioned. We now turn to an analysis of the last-mentioned section.

Subsection A provides in pertinent part as follows:

Those students who qualify for a special program of instruction under this article shall receive an appropriation by the legislature apportioned in accordance with the provisions of § 15-1212 to each school district providing special education classes under the provisions of this article an amount specified by the superintendent of public instruction but not exceeding fifty dollars per unit of average daily membership per annum per program for each special education student taught by the district. . . .

Subsection B of A.R.S. § 15-1099 then provides as follows:

The appropriation shall be computed with reference to the estimated number of special education students as provided in § 15-1097 to be taught during the current school year for common schools, in classes having a minimum of not less than one hundred twenty minutes nor more than three hundred sixty minutes of instruction per school day.

The above-quoted part of subsection A states that the State appropriation for bilingual purposes shall be apportioned in accordance with A.R.S. § 15-1212, which is the general apportionment provision relating to State aid for education. The State aid is apportioned based

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upon the numbers of pupils in the various counties throughout the State. Consequently, it was necessary for the Legislature to establish the method by which pupil attendance would be determined. In so doing, the Legislature, in paragraph 1 of subsection C of A.R.S. § 15-1212, defined a common school to include kindergarten through the eighth grade. Then, in paragraph 4 of that subsection, the Legislature defined the term "daily attendance" to mean, for kindergartners in common schools, a day in which a kindergarten pupil attends a minimum of 120 minutes. This reference to 120 minutes is instructive, because the above-quoted subsection B of A.R.S. § 15-1099 states that the State appropriation for bilingual instruction is to be computed with reference to the estimated number of pupils in a bilingual program in classes starting with a minimum of 120 minutes, which are obviously kindergarten classes. It would be totally illogical to calculate the State aid using figures that included pupils in kindergarten while at the same time prohibiting any part of that aid from being allocated for the benefit of kindergarten pupils. Not only would it be illogical, but it would also fly in the face of sound policy, conflict with a prior opinion of this office and contravene a previous legislative interpretation of A.R.S. § 15-1099.

The prior legislation was House Bill 2350 (Ch. 203, Laws of 1974), which, among other things, appropriated money to the State Board of Education and the Superintendent of Public Instruction. The pertinent part of that Bill (subdivision 64 of section 1) sets forth a lump sum appropriation for bilingual education for "the education of students in grades k through 4 enrolled in special English training as provided by section 15-1097, Arizona Revised Statutes." This prior legislative construction supports the conclusion that kindergartners are included within the scope of the State aid program for bilingual education. It is of no import that the language used in this year's appropriation bill is not identical, since there is no obvious purpose to exclude kindergartners.

What is more, in a letter dated September 28, 1972, addressed to Arizona State Senators James A. Mack and Fred Koory, then Assistant Attorney General Ralph E. Willey, in responding to a question concerning the apportioning of funds for bilingual instruction and special English training, assumed, without discussion,

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that Article 10 included kindergarten pupils within its scope. That opinion should not now be lightly disregarded, when the Legislature has not seen fit to mandate a different conclusion.

Lastly, on this point, it would seem that the earlier a child participates in a bilingual program, the faster he will be able to effectively participate in a class conducted in English. This has, in fact, been recognized by the Legislature, since it has determined, as previously mentioned, that the lower grades should be given priority when the funds are allocated.

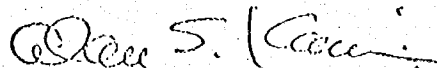
In summary, for all of the foregoing reasons, it is our belief that the State Board of Education may allocate for the benefit of kindergarten pupils a part of the funds appropriated by House Bill 2423 for special English training and bilingual instruction. For this purpose, eligible kindergartners shall be included with other eligible pupils in grades one through four.

Turning now to your second question, the limitation on the dollar amount of the state aid for these purposes is set forth in the above-quoted subsection A of A.R.S. § 15-1099. That subsection states that a district shall receive an appropriation to be apportioned in accordance with the provisions of A.R.S. § 15-1212, but not exceeding \$50.00 per unit of average daily membership per annum per program for each special education student taught by that district. Paragraph 5 of subsection C of A.R.S. § 15-1212, which defines "average daily membership", states that a kindergarten student shall be counted as one-half of a full time student for average daily membership purposes. Consequently, the dollar limitation per kindergarten student should be \$25.00, or one-half the dollar limitation for each unit of average daily membership per annum per program for each special education student in grades 1 through 8.

Should you have any further questions in this regard, please let us know.

Sincerely,

BRUCE E. BABBITT
Attorney General



ALAN S. KAMIN
Assistant Attorney General